In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 217

WILMA E. ADDISON, ERNESTINE C. LYLES, EDGAR CAMPBELL, SALLIE BAKER, AND LUTHER BLACK, ET AL., PETITIONERS

v.

HOLLY HILL FRUIT PRODUCTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This action was brought by employees against a commercial canning company which employs over 200 workers to recover wages and liquidated damages claimed to be due under the Fair Labor Standards Act of 1938. It involves, among other things, the validity of regulations promulgated by the Administrator of the Wage and Hour Division, United States Department of Labor, defining the scope of the exemption provided by Section

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13 (a) (10) of the Act. Section 13 (a) (10) provides an exemption from the wage and hour provisions of the Act for—

> any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.

The question of validity relates to the numerical limitation in the following definition:[1]

> An individual shall be regarded as employed in the "area of production" within the meaning of Section 13 (a) (10) * * * (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven (29 C. F. R. (1940 Supp.) 536.2).

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[1] The several forms in which "area of production" has been defined are printed at pp. 39–43 of respondent's brief. Alternative tests of "area of production" were also provided in the regulations during the period of this action. At the present time, however, with the exception of special definitions relating to dry edible beans and Puerto Rican leaf tobacco, the only basis for exemption is that quoted in the text, with the number of permissible employees increased from seven to ten. 6 F. R. 5165.

The court below held invalid the requirement that the employees in the establishment not exceed seven, on the ground that the number of employees in an establishment has no relation to the area of production. Applying what it considered the valid portions of the Administrator's definition, after "striking down invalid portions" (R. 228), the court held that respondent's employees were exempt from the Act.

Because of the importance of the questions involved and the need for their clarification the Government requests that the petition for a writ of certiorari be granted.

1. The problem affects large numbers of employers and employees. It is estimated that more than 750,000 employees are engaged in the operations enumerated in Section 13 (a) (10).[2] They are ordinarily low-paid and work long hours, so that the applicability of the exemption in Section 13 (a) (10) would materially affect the administration of the Act. On the basis of the number of employees concerned, annual wage payments of from $25,000,000 to $50,000,000 turn on the scope to be given the term "area of production."

2. Unless the questions presented here are settled by this Court, the Administrator is confronted with serious practical problems. The alternative courses of action open to him are (1) to leave

[2] Estimate of Economics Branch, Wage and Hour Division, United States Department of Labor.

his definition undisturbed pending adjudication by other circuit courts of appeals, or (2) to abandon his present definition in favor of a new one without a numerical limitation. Both alternatives are unsatisfactory. Under the first alternative the courts in the Fifth Circuit would be free to write their own definition of the exemption.[3] Numerous employers and employees in that circuit would be in the dark as to their rights and liabilities unless and until suit was instituted and a determination made in each individual case. Moreover, application of varying definitions in different judicial circuits would cause discrimination among competitors. The second alternative, to adopt a new definition without numerical limitation, would present great difficulties to the Administrator. The Administrator is convinced that other proposed definitions are so impracticable and economically unsound

[3] In other circuits the district courts have reached varying results. With *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1004–1005 (S. D. Calif.); *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980 (W. D. Ky.; *Walling* v. *Lincoln Looseleaf Warehouse Co.*, 6 Wage Hour Rept. 68 (E. D. Tenn. 1943); *Cox* v. *Swift & Co.*, 5 Wage Hour Rept. 341 (N. D. Tex. 1942); compare *Byus* v. *Traders Compress Co.*, 6 Wage Hour Rept. 66 (W. D. Okla. 1942); *Shain* v. *Armour & Co.*, 6 Wage Hour Rept. 715 (W. D. Ky. 1943); *Walling* v. *McCracken County Peach Growers Assn.*, 6 Wage Hour Rept. 718 (W. D. Ky. 1943); *Rafael Bruno* v. *The Hill Brothers Co. of P. R.* (D. P. R.), not yet reported; *Holt* v. *Barnesville Farmers Elevator Co.* (Minn.), not yet reported.

that he is loath to abandon the numerical limitation, unless the decision of this Court makes such action necessary.

The present definition was adopted only after lengthy hearings and thorough consideration of the other possible alternative definitions. The drafting of a practicable definition of "area of production" has not been an easy task. Indicative of the complexity of the problem is the fact that there are more than 300 different agricultural and horticultural commodities grown in all parts of the country.[4] Careful study and thorough understanding of the conditions in the numerous industries concerned were necessary to avoid a definition which would cause unjustified competitive inequalities and grave economic dislocations. Several successive Administrators have devoted considerable time and study to the problem. In the period from October 20, 1938, to October 6, 1941, eight definitions or amendments were promulgated.[5] Numerous conferences with

[4] The United States Census lists more than 300 different agricultural and horticultural commodities which are produced in the United States. Farm and Ranch Schedules, U. S. Census of Agriculture, taken by the Bureau of Census, U. S. Department of Commerce, *Sixteenth Census of the United States: 1940.*

[5] Each of these was published in the Federal Register before its effective date: 3 F. R. 2536 (October 22, 1938); 3 F. R. 3072 (December 22, 1938); 4 F. R. 1009 (February 25, 1939); 4 F. R. 1655 (April 20, 1939); 4 F. R. 2436 (June 17, 1939); 5 F. R. 2647 (July 24, 1940); 6 F. R. 1476 (March 18, 1941); 6 F. R. 5165 (October 11, 1941).

United States Department of Agriculture experts were held and many representatives of industry and labor were consulted. Extensive hearings, both formal and informal, were conducted upon the application of various industries. Representatives of the sugar, cotton, grain, tobacco, bean, seed, alfalfa and fresh fruits and vegetables industries were heard at length.* Twenty-four volumes containing more than 4,000 pages were taken at the formal hearings alone. The definition in issue here was adopted after thorough consideration of many other possible definitions. The Administrator considered a flat mileage criterion and concluded that it would not only raise difficult inspection problems but would work grave discriminations, since plants of the same nature and size and competing in the same market, may draw from five miles in the eastern part of the country, and from a hundred miles or more in western parts of the country. He considered the feasibility of "mapping" geographical regions for each agricultural or horticultural commodity and

* See Hearings on Proposed Amendment of Section 536.2 (area of production) of Regulations issued under the Fair Labor Standards Act of 1938, Wage and Hour Division, United States Department of Labor: General hearings, Reference Nos. 162a (4 vols.), 72 (1 vol.); on fresh fruits and vegetables, Reference Nos. 54 (4 vols.), 73 (2 vols.), 162b (3 vols.), 162c (3 vols.); on dry edible beans, Nov. 14–15, 1938 (2 vols.); on tobacco, Reference No. 48 (2 vols.); on poultry, Reference No. 58 (1 vol.); on seed, Reference No. 71 (1 vol.); on alfalfa, Reference No. 373 (1 vol.).

concluded that the enormity of the task alone would make it impossible of execution, and that in any event such a definition would place at a wholly unfair competitive advantage the regions where small diversified farming, rather than specialized production, is practiced. General definitions, such as "general vicinity" and "neighborhood" were rejected because they either amounted to a blanket exemption or provided too indefinite a rule in the absence of other limitations.

In contrast to these proposals, the present definition with its limitation upon the number of employees was believed to involve a minimum of competitive discrimination and to be sufficiently definite. In addition it was felt that it would automatically confine the exemption geographically, because a small plant can absorb only a limited amount of agricultural commodities, and its capacity is normally sufficient only for the products of nearby farms. Thus there is good reason to assume that a test based upon a small number of employees is not dissociated from, but rather implements, the standard of nearness implied in the phrase "area of production." Accordingly, the ruling of the court below that the number of employees has no relation to area of production is certainly questionable.

Under the circumstances the Administrator feels that he should have this Court's decision before abandoning a definition which has been so pains-

takingly contrived, in favor of some other proposal which in his opinion would create grave economic dislocations.

Respectfully submitted.

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